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No. 89-1788

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Claude C. Fletcher
Petitioner,

v.

San Jose Mercury News, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
CALIFORNIA COURT OF APPEALS,
SIXTH DISTRICT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner Claude C. Fletcher ("Fletcher") respectfully submits this reply brief in response to the Brief of the San Jose Mercury News ("News") in opposition to Fletcher's petition for a writ of certiorari.

Respondent's Brief In Opposition is little more than a clever attempt to cast doubt on petitioner's facts. In its attempt to accomplish this, News takes great liberties with the facts of this case. Many of their assertions are totally without foundation and do not contain accurate references to the record. Rather than rebut every incorrect statement, petitioner will only discuss a few of the more important issues.

The Brief In Opposition uses references to respondent's transcript of the Fletcher/Mercury News interview. The tape recording of that interview shows that many of the "references" in their brief are inaccurate and do not correctly reflect that interview. Even the trial court judge refused to accept their transcript because of the many substantive errors it contained.

Also, throughout the brief, respondent makes a number of false statements regarding ESO board members and the record clearly contradicts their contentions.

Respondent apparently takes a calculated gamble that this Court will not grant the writ and they will not be held accountable for their mistatements of fact and inaccurate references to the record.

REPLY TO RESPONDENT'S ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT

I. STATEMENT OF THE CASE

1. News disputes Fletcher's statement that its investigation was delayed for six months until he stood for re-election and asserts the Joe Melino report was different from the investigation that prompted the News' investigation and story in issue here (res., p. 3).

Reporter Scott Herhold's testimony shows that Joe Melino was the source of Trounstine's information:

Q. Did he (Trounstine) tell you where he got the info? *A. No. But he did suggest I should talk to Joe Melino.* Q. Would you say this was your first contact, in any stretch of the word, with the Fletcher situation? *A. Yes.* Q. Did you ask Mr. Trounstine any questions? You've told us what you recall him saying to you. Did you say anything to him? *A. I can't recall what I said.* Q. After you and Mr. Trounstine finished your conversation, was the next step to go speak with Mr. Melino? *A. Yes.* Q. You

did not, for example, go and review any documents or talk to anyone else before going to Mr. Melino? *A. No.* Q. Did Mr. Trounstine ever tell you where he got his information that he imparted to you? *A. As I say, he told me that I ought to talk to Mr. Melino, so I assume Mr. Melino was one of his sources.* (Scott Herhold deposition Volume I, November 12, 1984, page 69).

2. News also disputes Fletcher's statement that the Court of Appeal erred in noting that one of the alleged sources of information declined to speak to Trounstine (res., p. 3).

The record shows differently: Q. Did you (Joe Melino) recall Mr. Trounstine asking you to call Paul Goda and ask him if he would be willing to go on the record with respect to some of this information? *A. That could be, sir, but I don't recall that specifically at this point* (8 RT 2080:12-16).

Of course, Mercury News employee, Phil Trounstine, testified that Melino told him Father Goda was not willing to talk (5 RT 1212). The jury obviously made a credibility determination on Mr. Trounstine.

It should be noted, Father Paul Goda, University of Santa Clara law professor, did not testify in agree-

ment with Mr. Trounstine's version of events, but he did testify that reporter Herhold was trying to "put words in his mouth against Fletcher and was on somewhat of a crusade against Fletcher" (3 RT 822).

3. Respondent references RT, p. 625 in disagreeing with petitioner's statement that the Appellate Court was "plainly wrong" in stating that Weathermaster received a small portion of the ESO contract being discussed in January - March 1983 (res., p. 5). That reference states: Q. ...Was that contract awarded by the same ESO agency that you had been bidding to in March of 1983? *A. Yes, sir* (3 RT 625, emphasis added). This was a discussion about a few units that had been done by Weathermaster at Tommy Fulcher's specific request in October of 1983, some seven months after the ESO low-income weatherization contract had been given, in its entirety, to other contractors. It was not the same contract that was bid in March 1983 as alleged by the Mercury News.

4. Respondent states "...he interviewed other witnesses who reported that petitioner had ties to Weathermaster prior to his resignation from the ESO board" (res., p. 7). Following this statement, respondent lists ten references to the record. Seven of those references have absolutely no relationship to the subject

matter. The remaining three are, at best, only tangential to the subject and were statements by the reporter.

As it did throughout this brief, respondent has tried to give "authority" to statements by listing erroneous references to the record.

5. Respondent states that "Fletcher denied he had recommended Weathermaster to the ESO board" (res., p. 8). News then references its transcript of the Fletcher/Mercury news interview. News tried to leave this same erroneous impression at trial and was proven wrong (4 RT 1154-1155). The tape recording was played for the jury, (8 RT 2112-2118), and it does not include any such statement by Fletcher. Fletcher has never disagreed with the fact that he recommended Weathermaster to ESO. News had portrayed that as "lobbying hard in an attempt to secure a contract for personal gain." Fletcher denied that and since both the jury and the judge found the articles to be false, we must assume this denial was believed by the triers of fact.

6. ...they confirmed that they had in fact given reporter Herhold information that tied plaintiff to Weathermaster prior to his resignation from the ESO board (res., p. 8).

This is a blatant distortion of the facts. The refer-

ences listed by respondent simply do not support that statement.

7. Respondent quotes Fletcher: "I saw a chance to move into that field and I took that opportunity, yes and granted, it did come about because of that investigation on behalf of the public agency, sure it did." (res., p. 9).

Respondent again uses a measure of deception. The tape recording shows this is one sentence taken out of a long discussion by Fletcher. It does not give the context of that statement and leaves an impression that is almost exactly opposite the discussion.

II. THE PETITION PRESENTS IMPORTANT ISSUES FOR REVIEW

1. The most important issues presented by petitioner relate to just how far a reporter can go in changing or originating supposed statements of news sources. Also, whether the Appellate Court's opinion, which apparently allows reporters to originate multiple fabricated statements with impunity, establishes the kind of precedent that accurately reflects this Court's approach to libel judgments regarding public officials. It is those questions that merit the grant of the Writ.

Even if respondent is correct that this Court recent-

ly addressed the first issue presented for review by petitioner (res. pp. 11,12), the remaining questions present even more important issues that must be addressed by this Court.

2. Respondent alleges: "Petitioner fails to disclose that the witnesses upon whom he relies either admitted that the reporter had correctly reported the substance of their comments ...or that those witnesses were so substantially impeached that their testimony could not possibly have constituted clear and convincing evidence of anything" (Res., p. 13).

That assertion is incomprehensible. The first statement is totally without foundation and has no reference to the record. The second statement can be dismissed by pointing out that the jury did make credibility determinations and they obviously did not agree with respondent. That also applies to many other statements presented by respondent throughout its brief.

3. Respondent states that "The primary source for the news stories here, ESO executive director Tommy Fulcher, was a reliable source who told a plausible story..." (res., p.13).

That is obviously not true based on information the

reporter had available to him (pet., pp. 15-17). Also, the telephone conversation secretly taped by the District Attorney impacted Fulcher's credibility (app., pp. 39a-46a). The jury had reason to believe Herhold was fully informed of the District Attorney's evidence due to Herhold's off-the-record source in the District Attorney's office (8 RT 2201-2203).

Fulcher's credibility was further eroded when he produced an ESO document with a missing torn-off corner which contained the date of the document (9RT 2381-2382). The same document, with the corner intact, was later introduced and showed that Fulcher's allegations about Claude Fletcher could not have occurred as stated by Fulcher (9 RT 2392). It should be noted, the intact document was available to News during its initial investigation of this story. It seemed apparent to the jury that Fulcher had torn off the document's date in an attempt to protect his story. Thus, had the lower court conducted a de novo review, it could not have agreed with the trial judge on Fulcher's credibility.

4. Respondent attempts to reject petitioners observation that the Mercury News deliberately did not listen to tapes of the February 1983 ESO board meet

ings. "...at the time of the investigation, the reporter was unaware that the special meeting had occurred" (Res., p. 14).

Testimony by Scott Herhold shows that to be incorrect: Q. Prior to the publication of your March 4 story, did you hear any tape recordings of ESO board meetings? *A. Yes.* Q. Which ones? *A. I know I listened to the January and to the March meetings. And I'm not certain about the--about February.* Q. Which March meeting? *A. The March 28th meeting.* Q. Any others? *A. Well, the January meeting.* Q. Just one meeting in January? *A. Yes.* Q. How about February? *A. I think I got--I asked for the tapes of all three, and there seemed to be relatively little in February, and so I don't have a clear recollection of having listened to that, the February tape.* Q. But you do have a clear recollection of asking for all of the tapes for January, February, and March? *A. I think so, yes.* Q. And to the best of your knowledge, whatever you asked for, they did provide to you? *A. I think so, yes.* (Scott Herhold deposition Volume II, November 20, 1984, pages 216, 217).

Q. I may have asked you this way back when, but how many different ESO board meeting tapes did

you listen to? *A. I know I listened to the January and to the March tapes, and I think I may have briefly listened to part of the February tape, but I don't have a real good recollection of that.* Q. Are you indicating one in January and one in March? *A. Correct.* Q. And how about February, what are you indicating? *A. I believe I listened to it very quickly, but I couldn't find anything immediately that I thought was relevant, so I didn't go through it in detail.*

(Scott Herhold deposition Volume IV, January 31, 1985, page 378).

Obviously, the reporter had in his posession and probably listened to the February ESO board meeting tapes that proved Fulcher's statements were not accurate, therefore, the jury had every right to assume he deliberately chose to avoid the truth. Harte-Hanks v. Connaughton 109 S. Ct. 2693 (1989). "Although failure to investigate will not alone support a finding of actual malice, *** the purposeful avoidance of the truth is in a different category" (id., 109 S. Ct. at 2698).

III. THE DECISION BELOW IS NOT IN ACCORD WITH DECISIONS OF THIS COURT

1. Respondent argues that the lower court decision is in accord with this Court and that it recognized

its obligation to review all the evidence of actual malice and its exhaustive review of the facts demonstrates that it did so (res., p 18).

With reference to the lower court decision, it is respectfully submitted that they had little time to review much more than the trial court opinion. Material presented by petitioner shows that to be the case (pet., pp. 13-26). The lower court opinion is clearly not in accord with this Court's opinion in Harte-Hanks Communications v. Connaughton.

2. Additionally, the lower court specifically addressed the issue of slander as presented by petitioner (pet., 15a) and came to a conclusion that is directly contrary to this Court's recent opinion in Michael Milkovich, Sr. vs. Lorain Journal Co. 497 U.S. Reports.

Petitioner originally filed both a libel and slander cause of action. Following the close of petitioner's case-in-chief, the trial court granted nonsuit of the slander cause of action (pet., p. 3). An appeal was immediately filed and was later consolidated with the libel appeal.

The court found the defamatory statements uttered orally by defendant reporter Scott Herhold, and the court assumed they were proved prima facie, were

constitutionally protected opinions (6 RT 1486-1487:10, CT 429:20-430:22).

In attempting to get a source to agree with him, reporter Herhold stated, "Why won't you help me get Claude Fletcher?" "Claude Fletcher is a crook and a crooked politician and I don't want him to be reelected." (3 RT 649, 650). This was said in an attempt to get damaging statements about petitioner from the hearer.

This Court stated in Milkovich v. Lorain, "The reference to 'opinion' in dictum in Gertz ... was not intended to create a wholesale defamation exemption for 'opinion' ... This decision balances the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation."

A reasonable factfinder could conclude that the statements made by Herhold imply Fletcher had committed some crime and the statements did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Herhold was seriously maintaining Fletcher committed some crime.

Nor does the statement's general tenor negate this impression. In addition, the connotation that Fletcher committed some crime is sufficiently factual that it is susceptible of being proved true or false Milkovich v. Lorain.

If an accusation is ambiguous, then it is a jury question as to whether the statement is protected opinion or not. Good Government Group, (1978), 22 C.3d at 682. Since the subject statements were not ambiguous, they were defamatory per se, Fisher v. Larsen (1983), 138 C.A.3d 627, and the lower court would have realized that had they conducted a de nova review rather than simply rely on the trial court opinion.

Thus, it is abundantly clear that the lower court opinion differs from this Court on several very important issues in this case.

CONCLUSION

Nothing is more precious than a person's good reputation in a community.

Petitioner suffered an irrevocable loss of reputation in his personal, professional, and political life because of respondent's calculated efforts at removing him from public office.

The First Amendment safe harbor should not

include protection from deliberate lies developed with the intent of forcing a public official from office, no matter how strongly a media entity disagrees with that public official.

The Petition for a Writ of Certiorari contains an accurate description of this case and presents several very substantial questions for this Court to answer.

Accordingly, this Court should grant certiorari to allow the submission of briefs and a complete review of the jury verdict with all the evidence on the table.

Respectfully submitted,

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